No. 02-434

COPY

Supreme Court, U.S.
FILED
DEC 13 2002
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
STEPHEN G. HERNDON
Supervising Deputy Attorney General
PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5290
Fax: (916) 324-2960
Counsel for Petitioner

CAPITAL CASE
QUESTIONS PRESENTED

1. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that a prisoner alleging ineffective assistance of counsel under the Sixth Amendment must overcome the strong presumption that his trial counsel's conduct, including conduct relating to investigations, "might be considered sound trial strategy[]" and that counsel's conduct must be evaluated from counsel's perspective at the time without the temptation to second-guess or the "distorting effects of hindsight[.]" In *Burger v. Kemp*, 483 U.S. 776 (1987), this Court held that there was a "reasonable basis" for trial counsel's strategic decision not to call the defendant's mother as a witness since he concluded her testimony would be unhelpful and potentially counterproductive. Trial counsel in the instant capital case did not present evidence of the family abuse experienced by the defendant's mother and the defendant as mitigating evidence because "he did not know what [the mother] would say[,]" "she had denied the abuse[,]" she had twice lied to the police about the defendant, neither defendant nor the mother were forthcoming about her "prior life[,]" and he did not want to open the door to damaging background information that the mother knew about Karis. The Ninth Circuit Court of Appeals held that counsel's decision was not a reasonable strategic decision and vacated the penalty phase for ineffective assistance of counsel. The questions presented are:

1. Whether the Ninth Circuit's reversal of a penalty phase for ineffective assistance of counsel conflicts with *Strickland v. Washington* and *Burger v. Kemp*, since trial counsel opted not to investigate further, or introduce in mitigation, evidence that the defendant and the defendant's mother had been abused, for the strategic reason that the mother had denied the abuse, had lied to the police, neither the

defendant nor his mother wanted counsel to pursue the mother's "prior life[,]" and counsel did not want to open the door to damaging background information that the mother knew about Karis.

2. Whether the Ninth Circuit is engaging in a mode of analysis of ineffective assistance of counsel which conflicts with *Strickland v. Washington* and *Burger v. Kemp* by utilizing "hindsight" and second-guessing to reject trial counsel's articulated tactical reasons for choosing to conduct a "less than complete" investigation when, under the circumstances at the time of trial, those express reasons are sufficient to support the strong, deferential presumption that trial counsel's conduct "***might*** be considered sound trial strategy[.]" (Emphasis added.)

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
Cases	
Burger v. Kemp 483 U.S. 776 (1987)	2
Strickland v. Washington 466 U.S. 668 (1984)	1-3
Wiggins v. Corcoran 288 F.3d 629 (4th Cir. 2002)	2, 6
Statutes	
Antiterrorism and Effective Death Penalty Act	2

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-434

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

ARGUMENT

Karis was convicted and sentenced to death for kidnaping two women, raping one, and murdering the other. Prior to Karis's penalty phase, his trial counsel investigated and developed evidence through a psychiatrist that Karis and his mother were abused when Karis was a child. (App. C at 75, 76). However, Karis's counsel ultimately made a strategic decision not to present this evidence because, when, prior to the penalty phase, Karis's counsel asked Karis's mother about the abuse, she denied that it had occurred. (App. C at 76.) Moreover, neither Karis nor Karis's aunt told counsel about abuse. (App. C at 76.) Although counsel conducted a determined investigation of abuse evidence, he declined to present abuse evidence because he did not believe he could risk presenting such evidence if Karis's mother could not be relied up to corroborate it. (*See* App. A at 64 [Kleinfeld, J., concurring and dissenting].) Despite this Court's admonition in *Strickland v. Washington*, 466 U.S. 668 (1984), to avoid hindsight and to presume that counsel's conduct, "'might be considered sound trial strategy[]'" (*id.* at 689), the Ninth Circuit

reversed Karis's penalty.

The Ninth Circuit's decision exemplifies an ongoing debate about counsel's duty to investigate under *Strickland* and *Burger v. Kemp*, 483 U.S. 776 (1987). It is the issue already confronting this Court in *Wiggins v. Corcoran*,[1] in which counsel made a strategic decision not to investigate and develop mitigating evidence. *See Wiggins v. Corcoran*, 288 F.3d 629, 639-43 (4th Cir. 2002).[2] This issue has also been a decisive one in the Ninth Circuit cases cited in the petition for writ of certiorari in this case. (Petition at 11-12.)

Karis mischaracterizes the Ninth Circuit's opinion as just another "unremarkable" and "routine" "case-by-case" application of *Strickland*. (Brief in Opposition ["Opp'n"] at 7, 15-16, 21.) However, the Ninth Circuit's opinion reveals otherwise:

> It is difficult to imagine what kind of standard the State conceives would allow counsel to rely almost solely on testimony that Karis was artistic and had academic potential to present a mitigating case, while failing to present *any* evidence of such substantial abuse to the jury for consideration in making a life or death determination for Karis.

(App. A at 49, emphasis in original.)

The absolutist rhetoric of the Ninth Circuit and Karis's Opposition begs the question. The "unimaginable" standard the State advocates is *Strickland*–a deferential standard

---

1. Certiorari granted on November 18, 2002, in case No. 02-311.

2. The State acknowledges that *Wiggins* is being reviewed under the Antiterrorism and Effective Death Penalty Act, while this case is not. *See Wiggins*, 288 F.3d at 636. However, both *Wiggins* and this case involve similar ineffective counsel issues: whether counsel is required to present social history mitigation evidence. *See id.* at 639-43.

based on an attorney's reasonable strategic decision that presenting potentially unreliable evidence of abuse would be tactically risky.[3/] The Ninth Circuit's disposition cannot be disguised as just the misapplication of a properly stated rule of law–it is an overarching redefinition of the governing standard in ineffective assistance of counsel cases which mandates introduction of abuse evidence even when that is against the better judgment of defense counsel.

Karis's counsel conducted an extensive penalty phase investigation which included investigating drug use, mental illness, and Karis's military records. (App. C at 75, 96-103.) Karis's counsel did develop evidence of childhood abuse by retaining a psychiatrist, Dr. Albert Globus. (App. C at 75.) There is no dispute that counsel made a reasonable tactical decision a week before the penalty phase began not to call Dr. Globus because of damaging information in his psychiatric report. (Opp'n at 18.) The Ninth Circuit and Karis fault counsel for not having a "Plan B" in lieu of Dr. Globus. (Opp'n

---

3. Karis mistakenly asserts that his *Strickland* expert testified to the applicable standard of care without contradiction. (Opp'n at 9, 10.) In fact, the State presented the declaration of its own *Strickland* expert, the Honorable Sheldon Grossfeld, the judge who presided over the 1982 trial, who opined that counsel's representation was adequate and proper and met an objective standard of reasonableness under *Strickland.* (Opening Brief of Respondent–Cross-Appellant/Appellee, filed in the Ninth Circuit ["OBR"], at 28-29, 30-31.)

Karis also claims that he was sexually molested by his father. (Opp'n at 4, 6, 11 n.4.) The only support for this assertion is the declaration of Karis's uncle, Anthony Cancilla. (*Id.*, citing Petitioner's App. C at 89.) However, Cancilla's declaration is not competent evidence: Karis's habeas counsel was unable to produce Cancilla for cross-examination. (OBR at 77-79.)

at 2; *see also* App. A at 42.)

However, counsel did have a "Plan B": the penalty phase defense that was actually presented. Counsel had strategic reasons for declining to question Karis's mother about the abuse: Karis's mother might have denied the abuse (possibly to protect her relationship with Karis's stepfather), and such questioning might have opened the door to damaging background information that she had about Karis (a robbery Karis was involved in as a juvenile; his military discharge; his attempted prison escape; his involvement in a prison incident–which resulted in a killing). (Petition for Writ of Certiorari at 8.) If other witnesses had been used to elicit the abuse evidence, but Karis's mother was not asked about it, or if she was asked and denied it, the absence of such testimony or her denials might at a minimum have struck the jury as suspicious. (*Id.*)

Further, questioning Karis's mother about abuse might also have enabled the prosecutor to impeach her on the ground that she had previously lied to police on Karis's behalf. (Petition for Writ of Certiorari at 8; *see also* Supplemental Appendix attached to this brief.)[4] Counsel's strategically limited questioning avoided such impeachment. Even if the prosecutor had been able to show that Karis's mother had lied to police, this would have done little to impeach the limited testimony she gave at the penalty phase (e.g., that Karis saved his half-brother from drowning). Thus, counsel had sound tactical reasons for acting as he did. The Ninth Circuit's

---

4. The Supplemental Appendix consists of a 1987 declaration by the trial prosecutor which states that he could have demonstrated the falsity of one of Karis's mother's alibi statements and which suggests that Karis's mother gave a false alibi in Karis's 1975 rape case. This declaration was part of the Supplemental Excerpts of Record (pages 5120-5121) filed in the Ninth Circuit.

disposition is the latest manifestation of that court's *per se* rule that counsel must always introduce social history evidence even when there are tactical reasons for declining to do so.

CONCLUSION

Accordingly, the petition for writ of certiorari should be granted. Alternatively, this Court should defer consideration of the petition until *Wiggins* is decided.

Dated: December 11, 2002

Respectfully submitted,

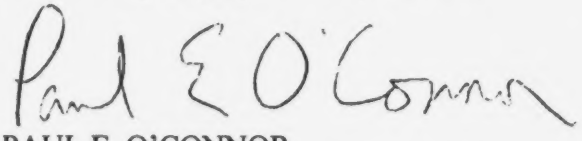
BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

STEPHEN G. HERNDON
Supervising Deputy Attorney General



PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

Supplemental Appendix

DECLARATION OF RONALD TEPPER

I am the District Attorney for the County of El Dorado. In or around the summer months of 1982 I was the prosecuting attorney in the case entitled People of the State of California vs. James Leslie Karis, this matter being tried on a change of venue in Sacramento County, before the Honorable Sheldon Grosfeld, Judge of the Superior Court.

Prior to commencement of the trial I conferred frequently with Detective Thomas Southern, an officer in the employ of the Placerville City Police Department. It was my understanding that Detective Southern was the officer most familiar with the investigation of the crimes in issue and that he had a thorough and definitive knowledge of the case. In or around July of 1981 Detective Southern advised me that he had interviewed the defendant's mother, one Eva Maria Jones. Thereafter he furnished the Office of the District Attorney with a report of this interview. A copy of that report is attached hereto, Marked Exhibit "A" and by this reference made a part hereof. Based upon Detecitve [sic] Southern's report, and my understanding of the facts of the case, it was my belief that: (i) Eva Marie Jones had given a false statement to Detective Southern; (ii) that her statement could be demonstrated as being patently erroneous; and (iii) that the statement was given to attempt to provide an alibi and to exonerate her son.

In preparation for the penalty phase of the above described case, I had acquainted myself with a 1975 case wherein the defendant had been convicted of rape. The victim of this incident was interviewed by my Chief Investigator, Russell Herman, and a liason [sic] had been established with law enforcement officers involved in the 1975 investigation. I was advised by these officers that Eva Marie Jones, the defendant's mother, had been interviewed at or about the time of the 1975 incident and that she had provided the authorities with false information attempting to provide an alibi for her son.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: November 3, 1987

RONALD TEPPER

District Attorney